No. 97.

Brief of Sutherland for P. C.

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In the Supreme Court of the United States.

October Term, 1897.

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THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, *Plaintiff in Error*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

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STATEMENT.

This is an action by Thomas W. Stewart, administrator of the estate of John Andrew Casey, for the benefit of the widow of the said Casey. The said John Andrew Casey was killed in an accident which occurred on the defendant's railroad between Dickerson and Tuscarora, in Maryland, on the 6th day of October, 1888. The deceased, at the time of the accident, was employed as a railway postal clerk, and as such, entitled to be carried to and fro on the defendant's road between Washington, D. C., and Tuscarora, Maryland, and while so engaged, was killed by reason of a collision occurring between the train deceased was on and another of defendant's trains on defendant's road between the above-mentioned places.

The suit was instituted on April 1, 1889, and on May 4, 1889, the defendant appeared generally and filed its plea of "not guilty." The case rested until May 26, 1894, when the plea was withdrawn and a demurrer to the declaration filed. The demurrer was sustained, with leave to the plaintiff to amend; and an amended declaration was filed on the 22d of October, 1894, setting forth the provisions of the Maryland Act.

The defendant filed a demurrer to the amended declaration, which demurrer alleged as legal propositions: (1) That the plaintiff could not recover in the District of Columbia for the death of his intestate in the State of Maryland, caused by the wrongful act of the defendant; (2) That the provisions of the act of Maryland could not be enforced in the District of Columbia.

This demurrer was sustained and an appeal duly taken and prosecuted.

Assignment of Errors.

1. The court erred in permitting the defendant to withdraw its plea in bar after the general appearance of the defendant.

2. The court erred in holding that the action could not be maintained in the District of Columbia.

3. The court erred in holding that the plaintiff was endeavoring to enforce the Maryland Act.

I.

The suit was filed April 1, 1889, a general appearance and plea of not guilty was filed on May 4, 1889, and on May 26, 1894, the plea in bar was withdrawn and a demurrer filed. It is respectfully submitted that, in view of the decisions of this court, that should not have been permitted.

In Kern *v.* Huidekoper, 103 U. S., 485, this court said: "The asking of leave to plead to the jurisdiction was in effect a withdrawal of the plea to the merits, for after a plea in bar the defendant cannot plead to the jurisdiction of the court, for by pleading in bar he submits to the jurisdiction. I Chitty Pleading, 440, 441; Co. Lit., 303; Com. Dig. Abatement, C.; Bacon Abr. Abatement (A)."

In Railway Company *v.* Church, 137 U. S., 568, it was held that misnomer of a corporation plaintiff was pleadable in abatement only, and was waived by pleading to the merits.

In Railway Company *v.* McBride, 141 U. S., 127, it was said: "* * * There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service but all special privileges of the defendant in respect to the particular court in which the action is brought. * * "

And again, 'Still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. *Ex parte* Schollenberger, 96 U. S., 369; Toland *v.* Sprague, 12 Pet., 300; Pollard *v.* Dwight, 4 Cranch, 421; Barry *v.* Foyles, 1 Pet., 311; Lexington *v.* Butler, 14 Wall., 282; Claflin *v.* Ins. Co., 110 U. S., 81."

And again, "Without multiplying authorities on this question it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district. Charlotte Bank *v.* Morgan, 132 U. S., 141; Construction Company *v.* Fitzgerald, 137 U. S., 98."

In Shaw *v.* Mining Company, 145 U. S., 444, it was said: "The Quinby Mining Company, a corporation of Michigan,

having appeared specially for the purpose of taking the objection that it could not be sued in the southern district of New York by a citizen of another State, there can be no question of waiver such as has been recognized where a defendant appeared generally in a suit between citizens of different States brought in the wrong district."

In Trust Company *v.* McGeorge, 151 U. S., 129, the court again announces the doctrine, so often announced theretofore, that the exemption of being sued out of the district of the domicil of the defendant is a personal privilege which may be waived, and which is waived by pleading to the merits.

In Construction Company *v.* Gibney, 160 U. S., 221, it was said: "The defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection."

It scarcely need be necessary to further multiply authorities, and comment on the authorities cited would be a work of superogation, as they speak more eloquently than could the author of this brief.

II.

An Action of Damages for Death in Maryland Caused by a Wrongful Act is Sustainable in the District of Columbia.

In Scudder *v.* Bank, 91 U. S., 406, it was said: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where brought."

In Dennick *v.* Railway Company, 103 U. S., 11, it was said: "The rule that 'the courts of no country execute the penal laws of another' * * * cannot be invoked as applicable to a statute of this kind, which merely authorizes 'a civil action, to recover damages for a civil injury.'"

In Myrick *v.* Railway Company, 107 U. S., 102, it was said: "In passing upon the rights of parties, this court will not be controlled by the judicial decisions of the State where the contract of carriage was made."

In Dennick *v.* Railway Company, 103 U. S , 11, it was said:

"It (the action of tort for death by wrongful act) is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendent may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. * * *

"It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right. * * *

"The action in the present case is in the nature of trepass to the person, always held to be transitory, and the venue immaterial. The local court and the Circuit Court of the United States for the northern district were competent to try such a case when the parties were properly before it.

"We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape the liability by going to New York. It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the

statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of citizens be redressed in no other State of the Union? The contrary has been held in many cases * * *."

That recovery may be had in a foreign jurisdiction for a death caused by wrongful act, because the action is transitory in its nature and the venue immaterial, is announced broadly, authoritatively, and conclusively, without qualification or hair-splitting distinction, appears from the court's further remarks.

"We are aware that Woodward *v.* Railway Company, 10 Ohio St., 121, asserts a different doctrine, and that it has been followed by Richardson *v.* Railway Company, 98 Mass., 85, and McCarty *v.* Railway Company, 18 Kan., 46. The reasons which support that view we have endeavored to show are not sound.

"The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decisions, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action."

"In Texas & Pacific Railway Company *v.* Cox, 145 U. S., 593, the eminent counsel for the appellant, Hon John F. Dillon, laid great stress on the proposition that 'The rule that the courts of Texas will not take jurisdiction of an action for damages of this character, where the cause of action arose in another State and under a foreign statute dissimilar in terms to the corresponding Texas statute, or where there is no corresponding Texas statute, has been repeatedly announced by the highest State court of Texas.'

The contention of counsel was disposed of thus: 'Counsel further urge with much earnestness, that the cause of action founded upon the statute of Louisiana, conferring the right to recover damages for an injury resulting in death was not enforcable in Texas.'

"The action being in its nature transitory, might be maintained if the act complained of constituted a tort at common law, but as a statutory delict, it was contended that it must be justiciable not only where the act was done but where redress is sought. If a tort at common law where a suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired; but if the cause of action was created by statute, then the law of the forum and of the wrong must substantially concur in order to render legal redress demandable.

"In The Antelope, 10 Wheat., 66, 123, Mr. Chief Justice Marshall stated the international rule, with customary force, that: 'The courts of no country execute the penal laws of another;' but we have held that the rule cannot be invoked as applicable to a statute of this kind, which merely authorizes 'a civil action to recover damages for a civil injury.' (Dennick *v.* Railway Co. 103 U. S. 11) * * *.

"And notwithstanding some contrariety of decision upon the point, the rule thus stated is generally recognized and applied where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced. * * *.

"In Texas and Pacific Railway *v.* Richards, 68 Tex., 375, it was said that while there was some conflict of decision, it seemed to be generally held that a right given by the statutes of one State, would be recognized and enforced in the courts of another State whose laws gave a like right under the same facts. In St. Louis Iron Mountain &c., Railroad Co. *v.* McCormick, 71 Tex., 660, the Supreme Court declined to sustain a suit in Texas by a widow for damages for the negligent killing of her husband in Arkansas; for the reason that the statutes of Arkansas were so different from those in Texas in that regard that jurisdiction ought not to be taken, but the

court indicated that it would be a duty to do so in transitory actions where laws of both jurisdiction were similar. The question, however, is one of general law, and we regard it as settled in Dennick *v.* Railroad Co., *supra*."

In Huntington *v.* Attrill, 146 U. S. 657, it was said:

"In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, The Halley, L. R. 2 P. C., 193, 204; Phillips *v.* Eyre, L. R. 6 Q. B., 1, 28, 29; The M. Moxham, 1 P. D., 107; Wooden *v.* Railway Co, 126 N. Y., 10; Ash *v.* B. & O. Railway Co., 72 Md., 144. But such is not the law of this court. By our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought. Smith *v.* Condry, 1 How., 28; The China, 7 Wall., 53; The Scotland, 105 U. S., 24; Dennick *v.* Railroad Co. 103, U., S. 11; Railway Co. *v.* Cox, 145 U. S., 593."

And again:

"That decision (referring to Dennick *v.* Railway Company) is important as establishing two points: 1st. The court considered 'criminal laws,' that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extra-territorially: 2d. A statute of a State manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased might be enforced in a circuit court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. The decision was approved and followed at the last term in Texas and Pacific Railway Co. *v.* Cox, 145 U. S., 593,

where the Chief Justice speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: 'The question, however, is one of general law, and we regard it as settled in Dennick *v.* Railroad Co.'"

In Martin *v.* Railway Company, 151 U. S., 689, it was said: "The creation of the right by the Maryland statute is jurisdictional, the manner prescribed in which the right may be pursued is modal, formal, and remedial only."

In Northern Pacific Railroad Company *v.* Babcock, 154 U. S., 190, the court again reasserts the broad and general rule laid down in Dennick *v.* Railroad Company.

In its opinion the court quotes at length, and with approval, from the case of Herrick *v.* Minneapolis & St. Louis Railway Company, 31, Minn., 11, and also cites with approval and at length, Higgins *v.* Railway Company, 155 Mass., 176, and in conclusion, says: "The rule thus enunciated had been adopted in previous cases and has since been approved by this court. Smith *v.* Condry, 1 How., 28; the China, 7 Wall., 53; Dennick *v.* Railroad Co., 103, U. S., 11; the Scotland, 105 U. S., 24; Huntington *v.* Attrill, 146 U. S., 657. Indeed, in Texas & Pacific Railroad Co. *v.* Cox, *supra*, Mr. Chief Justice Fuller, speaking for the court said: 'the question, however, is one of general law, and we regard it as settled in Dennick *v.* Railroad Co.'"

In Railway Company *v.* Wyler, 159 U. S., 289, it was said: "It is an elementary rule that limitations are governed by the law of the forum, and not by the law of the place where the event happened, which gave rise to the suit."

In St. Louis Railway Company *v.* James, 161 U. S., 554, it was said: "Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature."

One would suppose that the decisions above referred to, emanating as they do, from the court of last resort, for the whole country, and broadly stated as they are, would be considered as absolutely binding on any inferior court.

But not so. The opinion of the learned Court of Appeals of the District of Columbia (Record, pp. 7 to 12) demonstrates that no case can ever be binding except so far as the subsequent judge thinks the principle which the previous judge applied to the case was correct, and was applicable. If the principle was correct, but inapplicable, then the case is not an authority. If the principle, though applicable, was not correct, then, also, the case is of no authority. This doctrine for enabling a judge to escape from the fetters of previous decisions reminds one of the Jester's answer in "All's Well That Ends Well." It is difficult to see how any previous decision can escape from it.

The opinion also seems to overlook the fact that courts are established by society for society, for the sake of justice; not to be arenas for the dialectic skill of disputants, and justice like science should advance.

A careful examination of the opinion shows that although three cases had been decided by the Supreme Court of the United States since the case of Dennick *v.* Railroad Company, in all of which the broad rule adopted and laid down in that case was reaffirmed, and, if anything, enlarged upon, yet the District Court of Appeals takes absolutely no notice of the decisions, does not refer or allude to them in any way, but, on the contrary (impliedly at least) overrules them, without taking the trouble to point out wherein the Supreme Court of the United States was in error when it made the decisions.

This is a rather forcible method of enforcing on us that if individuals and courts shall disregard judicial authority and carry out their own peculiar views, the harmony of

our system of jurisprudence must be destroyed and the law of might must become the arbiter of rights.

With all due deference to the great ability and profound learning of the distinguished Court of Appeals of the District of Columbia, it is respectfully submitted that that court has wholly misapprehended the intended scope of the utterances of the Supreme Court of the United States in the construction of similar statutes which have come before it for judicial construction, and have assumed that because the narrow question of whether the right conferred by the Maryland statute could be pursued in the District of Columbia had not been decided by it, the Court of Appeals was at liberty to ignore the positive utterances of the Supreme Court of the United States on the subject of damages for death by wrongful act.

An analysis of the Maryland act shows:

That it is based on Lord Campbell's Act.

That it is intended to give compensatory damages for the tort of death by wrongful act.

That the action lies when the death shall have been caused by the wrongful act, neglect, or default of the defendant, when an action might have been maintained therefor by the party injured if death had not ensued.

That there be in existence some one of the persons for whose benefit the action may be brought.

That the suit shall be brought in the name of the State of Maryland, as a formal party, for the use and benefit of the party or parties entitled.

That the amount recovered shall be apportioned by the jury among the beneficiaries, and is not liable for the debts of the deceased.

That the time in which the action may be brought has not elapsed.

An analysis of the District of Columbia Act shows identically the same things, with the exception that the latter act requires the administrator to be the formal party plaintiff, and bring the suit for the use and benefit of the real parties in interest, and that distribution is made to the parties in interest by the statute of descent and distribution instead of by the jury.

An analysis of the decisions of the Supreme Court of the United States, on the question of the maintenance of action in a foreign jurisdiction, shows:

That the validity of a contract, and right of action thereunder, is determined by the law of the place where made.

That the performance, remedy, bringing of suit, admissibility of evidence, statute of limitations, &c., depend upon the law of the forum.

That while the creation of a statutory right is jurisdictional, the manner in which the right may be pursued is modal, formal, and remedial.

That the wrong need not be actionable by the law of the place where the redress is sought.

That the private action may be maintained in a foreign State (if not contrary to its own or public policy) for a wrong done in another and actionable there, even if not actionable in the State where suit is brought.

That the rule that "the courts of no country execute the penal laws of another" does not apply to this action.

That the action, while dependent on statute, is not local, and the defendant may be held liable in any court to whose jurisdiction he can be subjected by personal service or by voluntary appearance.

That the nature of the remedy or the jurisdiction of the courts to enforce it is not dependent on the question whether it is a statutory or common law right.

That the action is in the nature of trespass to the per-

son, always held to be transitory, and the venue immaterial.

That the dissimilarity of statutes is no bar to an action in a foreign jurisdiction unless the right conferred by the one is repugnant to the public policy of the other.

That the "substantial similarity" or "substantial inconsistency" referred to in the decisions does not mean a substantial similarity in the methods of enforcing the right conferred, but a substantial similarity in the Acts conferring the right of action itself, leaving the method of enforcing the right in a foreign jurisdiction to the law of the forum.

That the question is one of general law and settled by the Supreme Court of the United States for itself, and in favor of the maintenance of the action in a foreign jurisdiction without regard to whether the foreign jurisdiction has a similar or, indeed, any statute on the subject; and in arriving at this conclusion the court expressly declines to be bound or controlled by the decisions of the State courts.

That the only class of laws which cannot be enforced extra-territorially are "penal" laws, and the only class of "penal" laws meant are "criminal laws"—that is to say, laws punishing crimes.

Construing the declaration by these principles, it is indeed difficult to see or appreciate the insuperable obstacles raised by the Court of Appeals of the District of Columbia to the maintenance of the action in this jurisdiction for a death occurring in Maryland.

Such statutes exist in nearly every State, and are based on and drawn from the English statute known as Lord Campbell's Act. It is true these various statutes differ to a considerable degree in the language in which they are expressed, both from the original English act and from each other, even in respect to the three features

which have been called the distinguishing characteristics of the action created by Lord Campbell's Act, as, for example, in some statutes it is not expressly provided that neglect or default must be such as would have entitled the party injured to maintain an action; in others it is not expressly provided that the action is for the benefit of the particular members of the family, and in others it is not expressly provided that the damages recoverable are such as result from the death. These differences, however, are not substantial. They are mainly in respect to the particular members of the family for whose benefit the action may be brought, the persons in whose names they may be brought, the time within which they may be brought, the amount which may be recovered, the manner of distribution, and in respect to practice; in short, the differences are formal, not fundamental. In spite of the difference of phraseology in the various statutes, and in the Maryland and District of Columbia statutes in particular, it is self-evident, from an inspection of them, that the principles applicable to the measure of damages under all these acts is the same, to wit, that the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.

If we are to accept the law on the subject from the defendant, then the Maryland Act, which creates the right of action sought to be enforced here, imparted to that right an intangible, undefinable—certainly undefined—quality, which makes it enforceable only within the four corners of the State of Maryland. To reverse the proposition, the defendant company could escape all liability by removing from the State of Maryland. The mere statement of the proposition demonstrates its absurdity.

We scan the Maryland Act in vain for anything, either in terms or by fair implication, which would warrant the conclusion that causes of action arising under that act,

which confers a civil remedy for a civil injury, can only be brought and enforced in that State; and even if such were the necessary construction from the wording of the act, it would be in direct conflict with the numerous decisions of the Supreme Court of the United States, and we have yet to learn that the Maryland legislature has had the patent of infallibility conferred on it.

The act follows:

"1. Whenever the death of a person shall be caused by the wrongful act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to a felony."

The above section makes the liability of the corporation absolute where the death arises from its negligence. There is no qualification. The tort having occurred, the right of action accrues.

What is there peculiar about this action which makes it of necessity enforceable only in Maryland? Because the action is a creature of statute and unknown to the common law? What distinguishes the action from others admitted to be transitory, so that it can only be enforced within the prescribed jurisdiction, while the right of courts to entertain jurisdiction of other actions for torts wherever the defendant can be found and served with process is not questioned? Is it because death ensues? Where and what is the line of authorities establishing as a legal proposition that death changes a transitory to an intransitory action? How is the right to be enforced? Is it a criminal law which can only be enforced in the State whose legislature passes it and the offence was committed? Or is it, though a statutory right, a civil action to

recover compensatory damages for a civil injury, as declared by the Supreme Court of the United States over and over again? Are we to be bound by the solemn utterances of the Supreme Court of the United States, and accept as a settled fact and one removed from the realm of controversy that the action of tort for death by wrongful act is transitory in its nature and the venue immaterial, or are we to conclude that the numerous utterances of that court on that point for the past seventeen years were mere empty phrases, and to be counted but as sounding brass or tinkling cymbals? What principle of jurisprudence is served by holding that the Maryland act does not give a right of action enforceable beyond the geographical limits of that State?

That the question is one of general law and definitely established in favor of the entertainment of jurisdiction by a foreign tribunal of such cases, unless it would be against good morals or natural justice, or that for some such reason the enforcement of it would be prejudicial to the general interests of the citizens of the State where the remedy is sought to be enforced; and that this conclusion has been reached by other courts than the Supreme Court of the United States see: Bruce's Adm'r *v.* Railway Co., 83 Ky., 174; Wooden *v.* Railway Co., 126 N. Y., 10; Morris *v.* Railway Co., 65 Iowa, 727; Burns *v.* Railway Co., 113 Ind., 169; Sheed *v.* Moran, 10 Ill. App., 618; Knight *v.* Railway Co., 108 Pa. St., 250; Railway Co. *v.* Doyle, 60 Miss., 977; Railway Co. *v.* Nix, 68 Ga., 572; Railway Co. *v.* Swint, 73 Ga., 651; Railway Co. *v.* Lewis, 24 Neb., 848; Railway Co. *v.* Sprayberry, 9 Heisk (Tenn.), 852; Railway Co. *v.* Ayres, 16 Lea (Tenn.), 725; Nelson's Adm'r *v.* Railway Co., 14 S. E. Rep., 838; Railway Co. *v.* Shield's Adm'r, 18 S. W. Rep., 944; Railway Co. *v.* McMullen, 117 Ind., 439; Higgins *v.* Railway Co.,

155 Mass., 176; Rorer on Interstate Law, 2d ed., 217; Herrick *v.* Railway Co., 31 Minn., 11, affirmed 127 U. S., 210.

III.

The plaintiff did not attempt to enforce the provisions of the Maryland Act, but to pursue a right accruing to him by virtue of that act, and sought his remedy in accordance with the mode of procedure of the local forum, on the theory that "where the right is found the remedy must follow, of course," and that the defendant, being a domestic corporation for the transaction of business, was entitled to the remedial limitation provided by the local forum.

In the case of Huntington *v.* Attrill, 146 U. S., 657, which was a case to enforce in Maryland a judgment obtained in New York, the Maryland Court of Appeals declined to maintain Huntington's right to enforce the judgment, because the judgment had, as the court held, been rendered in another State in an action for a penalty.

The Supreme Court, by Mr. Justice Gray, say:

"The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this court has jurisdiction on this writ of error. * * *

"In order to determine this question it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.' (The Antelope, 10 Wheat., 66.)

"In interpreting the maxim there is danger of being misled by different shades of meaning allowed to the word 'penal' in our language.

"In the municipal law of England and America the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily they denote punishment,

whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws. United States *v.* Reisinger, 128 U. S., 398; United States *v.* Choteau, 102 U. S., 603.

"But they are also commonly used as including any extraordinary liability to which the law subjects a wrong-doer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum,' or 'penalty' of a bond. In the words of Chief Justice Marshall: 'In general, a sum of money in gross to be paid for the non-performance of an agreement is considered as a penalty, the legal operation of which is to recover damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. Taylor *v.* Sandiford, 7 Wheat., 13.

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrong-doer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * *

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. According to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species; private wrongs and public wrongs.' The former are an infringement or privation of the private or civil rights belonging to individuals, and are thereupon frequently termed civil injuries; the latter a breach and violation of public rights and duties which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors. 3 Bl. Com., 2.

"Laws have no force of themselves beyond the jurisdiction of the State which enacts them and can have extra-territorial effect only by the comity of other States. The general rules of international comity upon this subject

were well summed up before the American Revolution by Chief Justice DeGrey, as reported by Sir William Blackstone: Crimes are in their nature local. And as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequnter rei*. Rafael *v.* Verelst, 2 W. Bl., 1055. * * *

"Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession. Whether actions to recover pecuniary damages for trespass to real estate, 'of which the causes, as observed by Mr. Westlake (Private International Law, 3d ed., p. 213), 'could not have occurred elsewhere than where they did occur,' are purely local or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only affording a personal remedy. By the common law of England, adopted in most of the States of the Union, such actions are regarded as local and can be brought only where the land is situated. Doulson *v.* Mathews, 4 T. R., 503; McKenna *v.* Fisk, 1 How., 241.

"But in some States and countries they are regarded as transitory, like other personal actions. * * *

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick *v.* Railroad Company, 103 U. S., 11."

"It has been demonstrated that the liability of the defendant company is a personal one; and a personal liability created by the statute of another State will, as other personal obligations, be enforced according to the course of procedure in the place where the defendant is found. Lowry *v.* Inman, 46 N. Y., 119; Pickering *v.* Fisk, 6 Vt., 102; Railway Co. *v.* Sprayberry, 8 Bax. (Tenn.), 341; Whitford *v.* Railway Co., 23 N. Y., 465; McDonal *v.* Mallory, 77 N. Y., 547; Vanderwenter *v.* Railway Co., 27 Barb., 244; Railway Co. *v.* Miller, 19 Mich., 305."

The variance in the party designated by the Maryland statute and the party actually suing is not such an one as to bar the action. The party actually suing does not sue in his broad representative capacity, but as a trustee for the beneficial party in interest, who is the same under both statutes. And, if it were deemed necessary to comply literally with the Maryland Act, the compliance could easily be made by amendment, as the amendment would be one of form and not of substance, and, when made, would relate back to the time of filing the suit. In that regard, however, it is proper to note that the Supreme Court in general term, in an unreported case, decided that the State of Maryland could not be a suitor in the District Court in an action of damages for death.

From the foregoing propositions, sustained as they are by eminent, authoritative, and conclusive decisions of the Supreme Court of the United States, and also of numerous and well-reasoned decisions by State courts, the following propositions, it is respectfully submitted, are established beyond controversy:

1. That the defense interposed by the demurrer, if in fact a defense, was a personal one which could be waived, and which was waived by the defendant when it pleaded the general issue.

2. That the action sought to be maintained here is a transitory one and the venue immaterial.

3. That the dissimilarity between the Maryland and District of Columbia statutes is not such as to bar the action here.

4. That the plaintiff is not seeking to enforce the provisions of the Maryland Act, but to prosecute here, in conformity with local procedure, the right of redressing a wrong, which right is created by the Maryland act, and may be enforced by the local tribunals in conformity with the local remedial procedure.

5. That the action here, seeking to pursue the right conferred on the party beneficially interested, would not and could not be barred unless the defendant showed affirmatively that the right created by the foreign statute, and sought to be enforced locally, was contrary to our public policy, or to abstract justice, or to pure morals, or was a penal (criminal) law, or was calculated to injure the local jurisdiction or its citizens.

For these reasons, it is submitted, the judgment of the court below sustaining the demurrer should be reversed.

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